

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	8:06CR295
)	
v.)	
)	
KENNETH R. HEATH,)	MEMORANDUM OPINION
)	
Defendant.)	
_____)	

This matter is before the Court on defendant's motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence by a person in federal custody (Filing No. 51). Defendant's first contention is that counsel was ineffective for failing to file a timely notice of appeal. The Court notes in Paragraph 11 of his plea agreement (Filing No. 26) that defendant expressly waived any and all rights to appeal his conviction.

Defendant further contends that counsel was ineffective for failing to challenge the indictment's constructive amending which allowed the Court to enhance for an uncharged firearm. Paragraph 10(b) of the plea agreement provides:

The parties agree you possessed a dangerous weapon in connection with the offense, resulting in a two level enhancement pursuant to U.S.S.C. § 2D1.1(b) (1).

Defendant also contends that counsel was ineffective for failing to challenge the 100 to 1 crack cocaine to powder cocaine ratio, and to argue for a reduced sentence. Counsel did

in fact make such argument, and defendant was sentenced under the guidelines that were in effect at that time.

For the foregoing reasons, defendant's motion will be denied. A separate order will be entered in accordance with this memorandum opinion.

DATED this 24th day of June, 2008.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court